

**STATE OF MICHIGAN**  
**IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

-vs-

**TIMOTHY WADE HORTON**

Defendant-Appellant

**Supreme Court No. 150815**

**Court of Appeals No. 324071**

**Lower Court No. 13-247924 FH**

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**BRIEF ON APPEAL**  
**ORAL ARGUMENT REQUESTED**

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<sup>1</sup> This Court's order granting leave to appeal includes references to both the violation of Mr. Horton's speedy trial rights and the violation of the statutory 180-day rule, MCL 780.131 and 780.133. While Mr. Horton has continually asserted the violation of his speedy trial rights in the courts below, he has never asserted a violation of the statutory 180-day rule. The statutory 180-day rule applies to situations where a prisoner being held by the Michigan Department of Corrections has additional charges pending. Mr. Horton was not being held by the Michigan Department of Corrections when he was charged in this case, thus the 180-day rule is not at issue.

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**STATEMENT OF QUESTION PRESENTED**

- I. A PLEA THAT IS NOT KNOWING OR VOLUNTARY VIOLATES DUE PROCESS. WHERE MR. HORTON WAS NOT ADVISED THAT AN UNCONDITIONAL PLEA WAIVED HIS RIGHT TO APPEAL THE SPEEDY TRIAL ISSUE, WAS COUNSEL'S ADVICE DEFICIENT AND WAS MR. HORTON PREJUDICED BY THE RESULTING WAIVER? IS MR. HORTON ENTITLED TO PLEA WITHDRAWAL?

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

## **STATEMENT OF FACTS**

In May 2012 there was a break-in at a factory in Oakland County. Information, 10/25/13. Mr. Horton was first charged in connection with the break-in in Circuit Court Case No. 12-242967. 1a

In June 2013, Judge Bowman dismissed the charges.<sup>2</sup> 1a. Prior to this dismissal, Judge Bowman denied the defense motion to dismiss the case on speedy trial grounds. 1a.

In July 2013, Mr. Horton, who remained incarcerated, was re-charged in connection with the break-in in Court Case No. 13-246601. 3a. Judge Bowman again dismissed the case just two months later.<sup>3</sup> 3a.

In October 2013, Mr. Horton, who continued to remain incarcerated, was charged for the third time in the instant case. 4a.

The court adjourned the proceedings in January 2014 because Judge Bowman was not available. 4a. On March 7, 2014, Mr. Horton, who remained incarcerated throughout the pendency of all the proceedings, agreed to enter a no contest plea to breaking and entering with intent. 11a. At the plea hearing, there was a discussion of the amount of jail credit Mr. Horton would get against his sentence, which the parties estimated to be somewhere around 553 days due to Mr. Horton's continued incarceration. 16a, 19a-23a. During that discussion, Judge Bowman noted:

“Now, as your lawyer alluded to, it's brought to my attention that there was some concern or question about the amount of time you had been in jail awaiting to appear before the Court for your trial, and that this case had been dismissed a number of times and re-written, and over the course of being dismissed and re-written that

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<sup>2</sup> The record on appeal does not include any additional information about the basis for the court's order dismissing this case. 1a

<sup>3</sup> The record on appeal does not include any additional information about the basis for the court's order dismissing this case. 3a

you have actually remained incarcerated in the Oakland County Jail...”

19a-20a.

Prior to sentencing, Mr. Horton moved for plea withdrawal on the grounds that his plea was not knowing and voluntary; Judge Bowman denied his motion. 35a-38a. Judge Bowman sentenced Mr. Horton to 47 months to 15 years in prison with credit for 585 days credit for the time he served in jail prior to sentencing. 42a.

### **PROCEDURAL HISTORY**

Mr. Horton timely requested the appointment of appellate counsel. 48a. Thereafter, Mr. Horton’s original appellate counsel filed an Application for Leave to Appeal and Motion to Remand. 53a-77a. The brief and motion raised the following issue:

Defendant’s trial counsel was ineffective for (1) failure to make a motion to dismiss for violation of a speedy trial; and (2) failure to inform defendant if he pled no contest unconditionally without reserving the right to appeal issues involving speedy trial violations by the trial court, it constitutes a plea waiver of these issues, and thus the plea was not knowing, intelligent and voluntary violating MCR 6.310, and, thus it was error to deny defendant’s motion to withdraw his plea prior to sentencing.

53a-77a.

In support of the Motion to Remand, Mr. Horton signed a sworn statement asserting that his trial counsel never informed him that an unconditional no contest plea would waive his rights to raise the violation of his speedy trial rights and his rights to the effective assistance of counsel on appeal.<sup>4</sup> 78a. In addition, Mr. Horton would not have accepted the plea offer unless it was a

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<sup>4</sup> The Motion to Remand was initially filed with an unsigned affidavit from Mr. Horton. The signed and notarized affidavit was filed with the Court of Appeals a short time later.



conditional plea offer that allowed him to raise the speedy trial issue on appeal. 78a. Absent a conditional plea offer, Mr. Horton would have gone to trial. 78a.

In an Order, the Court of Appeals denied the motion to remand and denied leave to appeal. 79a.

Mr. Horton filed a pro per Application for Leave to Appeal to this Honorable Court.

On December 9, 2015, this Court granted leave to appeal on the following issues:

- (1) whether the defendant's unconditional no contest plea waived his claim of ineffective assistance of trial counsel based on trial counsel's failure to make a motion to dismiss for a 180-day rule violation, MCL 780.131 and 780.133, in light of *People v Lown*, 488 Mich 242, 267-270 (2011), or for constitutional speedy trial violations;
- (2) whether the defendant's unconditional no contest plea waived his claim of ineffective assistance of trial counsel for trial counsel's failure to inform the defendant that an unconditional no contest plea would waive his right to appeal on the basis of a 180-day rule violation or constitutional speedy trial violations; and
- (3) whether trial counsel's failure to inform the defendant that his unconditional no contest plea would waive his right to appeal on the basis of a 180-day rule violation and constitutional speedy trial violation made defendant's plea unknowing and involuntary.

80a.

Pursuant to this Court's order, the State Appellate Defender Office was appointed as counsel for Mr. Horton. 81a.

**I. A PLEA THAT IS NOT KNOWING OR VOLUNTARY VIOLATES DUE PROCESS. WHERE MR. HORTON WAS NOT ADVISED THAT AN UNCONDITIONAL PLEA WAIVED HIS RIGHT TO APPEAL THE SPEEDY TRIAL ISSUE, COUNSEL'S ADVICE WAS DEFICIENT AND MR. HORTON WAS PREJUDICED BY THE RESULTING WAIVER. MR. HORTON IS ENTITLED TO PLEA WITHDRAWAL.**

**Introduction**

Mr. Horton's attorney failed to advise him that his unconditional no contest plea waived his right to raise the violation of his speedy trial rights on appeal. Where Mr. Horton had previously sought dismissal on the basis of a speedy trial violation it was objectively unreasonable for his attorney to omit this critical advice. Mr. Horton would have proceeded to trial to preserve the violation of his speedy trial rights had he been properly advised. In other words, counsel's failure resulted in a plea that was not knowing or voluntary - a plea which violated due process. Mr. Horton is entitled to plea withdrawal.

To the extent Michigan case law suggests that a plea waives claims of ineffective assistance of counsel, it conflicts with United States Supreme Court jurisprudence and must be reversed. In addition, dicta in this Court's decision in *People v Lown* 488 Mich 242; 794 NW2d 9 (2011) is contrary to this court's decision in *People v New*, 427 Mich 482, 488; 398 NW2d 358 (1986) and should also be reversed.

Because of the overlapping nature of the questions presented, all three will be addressed together in this brief.

**Issue Preservation**

Mr. Horton preserved this issue for appellate review by moving to withdraw his plea before sentencing on the grounds that it was not knowing and voluntary. 35a-36a; MCR 6.310(D). Mr. Horton further preserved the issues presented in this case for appellate review by

filing a timely motion to remand on the basis of the asserted ineffective assistance of counsel in the plea proceeding. 70a; MCR 6.310(D).

### **Standard of Review**

A claim of ineffective assistance of counsel presents a mixed question of law and fact. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). Any findings of fact are reviewed for clear error, while questions of law are reviewed de novo. *Id.*

This Court must decide a claim of ineffective assistance of counsel based upon the existing record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Constitutional questions and the interpretation of a court rule or statute are questions of law that this Court reviews de novo. *Armstrong*, 490 Mich at 289; *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012); *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009).

**a. Appellate review of valid pleas is limited, but where a plea is unknowing and/or involuntary it is invalid, violative of due process, and must be set aside.**

Generally, the entry of a valid guilty or nolo contendere (“no contest”) plea constitutes a waiver of the ability to appeal most issues, except for those which “would preclude the state from ever prosecuting the defendant for the crime regardless of his factual guilt.” *People v New*, 427 Mich 482, 488; 398 NW2d 358 (1986). Thus, after entering a valid guilty or no contest plea, a defendant may raise on appeal<sup>5</sup> only those issues which “implicate the very authority of the

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<sup>5</sup> Any appeal to the Court of Appeals from a conviction resulting from a plea is by application, rather than by right. *Compare* MCR 7.203(A)(1)(b) and MCR 7.203(B)(1). While the parties may agree to preserve an issue by entry of a conditional plea, the appeal of a conditional plea is by application only. MCR 6.301(C)(2).

state to bring a defendant to trial.” *Id.* at 490, quoting *People v White*, 411 Mich 366, 398; 308 NW2d 128 (2012) (Moody, J., concurring in part and dissenting in part).

Because a plea functions as a waiver of constitutional rights, it must be knowing and voluntary to be valid. MCR 6.302(A). An involuntary plea violates state and federal constitutional due process guarantees. *McCarthy v United States*, 394 US 459, 466; 89 S Ct 1166; 22 L Ed 2d 418 (1968); US Const, Am XIV; Const 1963, art 1, § 17. A plea is not understanding and voluntary unless the defendant is “fully aware of the direct consequences” of the plea.<sup>6</sup> *Brady v United States*, 397 US 742, 755; 90 S Ct 1463; 25 L Ed 2d 747 (1970).

It is within a trial court’s discretion to grant a defendant’s motion for plea withdrawal made in advance of sentencing if the requirements of MCR 6.310(B) are satisfied. *People v Spencer*, 192 Mich App 146, 150; 480 NW2d 308 (1991). In cases where there is a defect in the plea proceeding, such as where the plea is not knowing and voluntary, a defendant is entitled to plea withdrawal as a matter of law. MCR 6.310(B)(1); MCR 6.310(C); *United States v Broce*, 488 US 563, 574; 109 S Ct 757; 102 L Ed 2d 927 (1989).

**b. The right to the effective assistance of counsel at all critical stages of legal proceedings includes plea proceedings.**

The right to the effective assistance of counsel is enshrined in our state and federal constitutions and “is a fundamental component of our criminal justice system.” *United States v Cronin*, 466 US 648, 653; 104 S Ct 2039; 80 L Ed 2d 657 (1984); US Const, Ams VI, XIV; Const 1963, art 1, § 20. The right to counsel applies to all critical stages of criminal proceedings, including plea proceedings. *Hill v Lockhart*, 474 US 52, 58; 106 S Ct 366; 88 L Ed 2d 203 (1985). “[P]erhaps

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<sup>6</sup> There are many different errors that can cause a plea to be unknowing and/or involuntary, such as when the court fails to comply with the requirements of MCR 6.302(B). Because this Court’s order granting leave is limited to ineffective assistance of counsel errors, so to is the discussion of unknowing and/or involuntary pleas in this brief.

the most critical period of the proceedings ... [is] the time of ...arraignment until the beginning of ...trial.” *Powell v Alabama*, 287 US 45, 57; 53 S Ct 55; 77 L Ed 158 (1932).

During these pretrial stages, counsel has a “critical obligation” to “advise the client of ‘the advantages and disadvantages of a plea agreement.’” *Padilla v Kentucky*, 559 US 356, 370; 130 S Ct 1473; 176 L Ed 2d 284 (2010), quoting *Libretti v United States*, 516 US 29, 50-51; 116 S Ct 356; 133 L Ed 2d 271 (1995). This obligation includes informing a defendant of any statutory and constitutional rights that a guilty plea might waive. *Libretti*, 516 US at 50-51.

Thus, “the two-part *Strickland* test<sup>[7]</sup> applies to challenges to guilty pleas based on ineffective assistance of counsel.” *Hill*, 474 US at 58. Prejudice following a guilty plea “focuses on whether counsel’s constitutionally deficient performance affected the outcome of the plea process.” *Id.* at 59. In other words, to prevail on a claim of ineffective assistance of counsel in the plea context, a defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have accepted the plea offer. *Id.*

**c. Trial counsel has an obligation to inform a defendant of the advantages and disadvantages of a plea agreement; counsel’s performance is constitutionally deficient where he fails to fulfill that obligation.**

Counsel’s deficient performance in advising a defendant regarding plea considerations can prejudice a defendant, whether that advice leads him to accept or reject a plea offer.<sup>8</sup> *Compare*

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<sup>7</sup> To prevail on a claim of ineffective assistance of counsel, a criminal defendant must first show that “counsel’s performance fell below an objective standard of reasonableness,” and that the defendant was prejudiced as a result. *Wiggins v Smith*, 539 US 510, 521; 123 S Ct 2527 (2003); *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Armstrong*, 490 Mich at 289-290. To establish prejudice, the “defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v Washington*, 466 US at 694.

<sup>8</sup> Here Mr. Horton pled “no contest,” rather than pleading guilty, however a no contest plea has the same legal effect upon appellate rights as a guilty plea. *New*, 427 Mich at 493.

*Hill*, 474 US at 52 (analyzing a claim of ineffective assistance of counsel where the defendant accepted a plea offer and forewent trial) and *Lafler v Cooper*, \_\_ US \_\_; 132 S Ct 1376; 182 L Ed 2d 398 (2012) (analyzing a claim of ineffective assistance of counsel where the defendant rejected a plea offer and was convicted at trial).

It is well-established that counsel's affirmative misadvice in plea proceedings constitutes deficient performance. *E.g.*, *People v Douglas*, 496 Mich 557, 593-594; 852 NW2d 587 (2014). Similarly, counsel's failure to warn or advise a defendant of the statutory and constitutional rights he waives by entering a plea is also constitutionally deficient. *See Libretti*, 516 US at 50-51, citing *Broce*, 488 US at 574 ("it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forgo").

Even counsel's failure to mention quasi-direct consequences of a plea, such as immigration statutes that mandate deportation for non-citizens convicted of certain offenses, can be constitutionally deficient. *Padilla v Kentucky*, 559 US 356, 369; 130 S Ct 1473; 176 L Ed 2d 284 (2010); *see also People v Fonville*, 291 Mich App 363, 394; 804 NW2d 878 (2011) (applying *Padilla* and concluding that counsel's failure to advise a defendant his plea would require him to register as a sex offender rendered the plea unknowing and involuntary). This is because such consequences are the direct result of a criminal conviction, have a tremendous impact of the defendant, and are dictated by statutes that are "succinct, clear, and explicit." *Padilla*, 559 US at 368; *Fonville*, 291 Mich App at 394.

- d. Where a defendant decides to accept a plea offer based upon counsel's constitutionally deficient advice (or failure to advise), the deprivation of the effective assistance of counsel renders the plea unknowing and involuntary, and entitles the defendant to withdraw the invalid plea.**

When a defendant asserts that trial counsel was ineffective in plea proceedings as Mr. Horton has done here, he is essentially arguing that his attorney failed to provide him with sufficient information to be able to make a knowing and voluntary decision about whether to accept the plea offer. Where a defendant, like Mr. Horton, decides to accept a plea offer based upon his counsel's advice, "the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill*, 474 US at 56, quoting *McMann v Richardson*, 397 US 759, 771; 90 S Ct 1441; 25 L Ed 2d 763 (1970). Without sufficient information, a plea cannot be knowing and is "consequently, involuntary." *Fonville*, 291 Mich App at 384 (internal citation omitted).

Where a plea is unknowing and involuntary, the plea is defective and the defendant is entitled to plea withdrawal as a matter of law. MCR 6.310(B); MCR 6.310(C); *Broce*, 488 US at 574.

- e. A plea does not waive any claim that counsel was ineffective for failing to provide accurate and complete advice about the direct consequences of the plea; published Court of Appeals decisions to the contrary were incorrectly decided in light of the United States Supreme Court decision in *Hill* and its progeny and should now be overruled.**

In the late 1980s and early 1990s, the Michigan Court of Appeals held that a knowing and voluntary plea waives any claims of ineffective assistance of counsel related to issues that are otherwise waived by a valid plea, such as a trial court's erroneous ruling on a motion to suppress evidence seized in violation of the Fourth Amendment. *See People v Vonins*, 203 Mich App 173, 175-176; 511 NW2d 706, 707 (1993); *People v Nunn*, 173 Mich App 56, 58; 433

NW2d 706 (1988). These cases did not analyze or consider the effect that counsel's ineffectiveness had on the knowing and voluntary nature of the defendant's plea in those cases.

Further, beginning in 1985, our United States Supreme Court has repeatedly reaffirmed the right to the effective assistance of counsel in plea proceedings. *See Hill*, 474 US at 52. *Hill* and its progeny have established that counsel's constitutionally deficient advice or failure to advise may entitle a defendant to plea withdrawal even where that advice has nothing to do with the defendant's factual guilt or innocence. *Id.* This is because counsel's advice, or failure to advise, can render a plea unknowing and involuntary. *Id.*, *see also Fonville*, 291 Mich App at 394. In other words, the ineffective assistance of counsel claim is not waived because counsel's ineffectiveness is what renders the waiver (the plea) invalid.

While many of these cases have focused on counsel's duty to accurately and thoroughly advise a defendant of the advantages and disadvantages of accepting a plea offer, *Padilla*, 559 US at 368, these cases also established as a matter of law that an otherwise valid plea does not waive claims of ineffective assistance of counsel more like those typically seen in the context of trials, *see Hill*, 474 US at 59.

In *Hill*, the Court discussed the application of *Strickland's* prejudice prong in the context of plea proceedings. *Id.* In concluding that the prejudice prong is satisfied where counsel's deficient performance led a defendant to accept a plea offer he would not have otherwise accepted, the Court specifically considered a hypothetical claim that counsel failed to "investigate or discover potentially exculpatory evidence." *Id.*

Since the *Hill* decision, the Court has never suggested that a plea somehow waives such claims. To the contrary, since that time, the Court has reviewed various types of ineffective assistance of counsel in plea proceedings. *E.g. Roe v Flores-Ortega*, 528 US 470, 477; 120 S Ct



1029; 145 L Ed 2d 985 (2000) (counsel's performance in plea proceedings was constitutionally deficient where counsel disregards specific instructions from the defendant to file a notice of appeal) (citations omitted); *Padilla*, 559 US at 368-369 (counsel's performance in plea proceedings is constitutionally deficient where counsel provides the defendant with false reassurance that his conviction would not result in the quasi-direct consequence of deportation). The Court's careful consideration of these ineffective assistance of counsel claims, including those arising in cases where the defendant accepted a plea offer, establish that a plea does not "waive" a claim of ineffective assistance of counsel where the ineffectiveness caused the plea to be unknowing and/or involuntary.

The United States Supreme Court has reached the only just conclusion on this point. As the Court observed in *Padilla*, a rule barring defendants from raising ineffective assistance of counsel claims related to their attorneys' failures to inform them of clear, direct consequences of their pleas, "would deny a class of clients...the most rudimentary advice...even when it is readily available." *Padilla*, 559 US at 370-371. Defendants in that position would be deprived of the effective assistance of counsel at a critical stage and left with no means by which to redress the violation of one of their most fundamental rights. The *Hill* Court carefully considered the so-called "floodgates" concern involved in the appellate review of ineffective assistance of counsel claims in plea cases and concluded that *Strickland's* prejudice prong functioned effectively to address those concerns. *Hill*, 474 US at 58; *see also Padilla*, 559 US at 371-372.

*Vonins* and the other Court of Appeals decisions which have relied upon *Vonins* are contrary to the more recent decisions of our United States Supreme Court. *Compare Hill*, 474 US at 52 and *Vonins*, 203 Mich App at 175-176. While our Court of Appeals has recognized and correctly applied *Padilla* in recent years, it has yet to overrule its contrary decision in *Vonins*.

*Fonville*, 291 Mich App at 394. This Court should expressly overrule *Vonins* to the extent it conflicts with *Hill* and its progeny.

- f. Mr. Horton is entitled to the remedy of plea withdrawal because his attorney's constitutionally deficient failure to advise him that his unconditional plea would waive any speedy trial violations<sup>9</sup> for the purposes of appellate review led him to accept a plea offer he would not have otherwise accepted.**

Mr. Horton is entitled to plea withdrawal because his plea was not knowing and voluntary. This was because he expressed an ongoing desire to argue that the charges should be dismissed with prejudice based on the violation of his speedy trial rights, but was not advised that the unconditional no contest plea would extinguish his ability to pursue that issue on appeal.

Mr. Horton's desire to pursue a claim that his speedy trial rights were violated was apparent from the record. He moved to dismiss the charges based on the violation of his speedy trial rights. 1a.

While the trial court denied his motion, it dismissed the charges a few weeks later. 1a.

A short time later, Mr. Horton, who remained incarcerated, was recharged, after which the charges were again dismissed. 3a. It was only after Mr. Horton was recharged a third time, continued to be incarcerated, and his attorney failed to move to dismiss on speedy trial grounds that he accepted a plea offer. 4a. Mr. Horton's affidavit, filed as an offer of proof in support of his timely Motion to Remand, established that at the time of his plea, he believed he would be able to pursue the speedy trial violation in the appellate courts. 78a. Mr. Horton's attorney never

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<sup>9</sup> This Court's order granting leave to appeal includes references to both the violation of Mr. Horton's speedy trial rights and the violation of the statutory 180-day rule, MCL 780.131 and 780.133. While Mr. Horton has continually asserted the violation of his speedy trial rights in the courts below, he has never asserted a violation of the statutory 180-day rule. The statutory 180-day rule applies to situations where a prisoner being held by the Michigan Department of Corrections has additional charges pending. Mr. Horton was not being held by the Michigan Department of Corrections when he was charged in this case, thus the 180-day rule is not at issue in this case.

advised him that by pleading no contest in this case, Mr. Horton would waive the right to have an appellate court consider his speedy trial violation as a matter of right. 78a.

Just as Mr. Padilla's counsel was ineffective for failing to advise his client that pleading guilty would lead to deportation, Mr. Horton's counsel was constitutionally deficient in failing to advise Mr. Horton that his plea would waive any speedy trial violation for the purposes of appeal. *See Padilla*, 559 US at 370, quoting *Libretti*, 516 US at 50-51.

Trial counsel was aware, or certainly should have been, that Mr. Horton was concerned about his speedy trial rights. The case had been ongoing for 553 days and there was extensive discussion at the plea hearing about how long Mr. Horton had been held in custody awaiting disposition of this case. 16a, 19a-23a. Further, a dismissal based on the speedy trial issue had been filed in an earlier proceeding. Nonetheless, counsel failed to inform Mr. Horton that as a direct consequence of his unconditional plea, he would waive any speedy trial violates and not be able to raise those issues on appeal.<sup>10</sup> 78a. Counsel's failure was objectively unreasonable under these circumstances. *See Padilla*, 559 US at 370, quoting *Libretti*, 516 US at 50-51.

If not for counsel's constitutionally deficient advice in the plea proceeding, Mr. Horton would never have accepted the plea offer. 78a. At the time he plead no contest, Mr. Horton believed that he would be able to pursue on appeal the violation of his speedy trial rights claim. 78a. In other words, there is more than a reasonable probability that Mr. Horton would have rejected the plea offer had he known his plea would have the effect of waiving any speedy trial violation. 78a; *Hill*, 474 US at 59-60.

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<sup>10</sup> Multiple published Court of Appeals cases have held that a valid plea waives speedy trial violations for the purposes of appellate review. *E.g. People v Scott*, 275 Mich App 521, 524; 739 NW2d 702, 704 (2007). While this line of cases is contrary to this Court's decision in *New*, see section (I) (E) *supra*, these cases were controlling, "clear, and explicit" at the time of Mr. Horton's plea. *Compare Padilla*, 559 US at 368.

Further, because of counsel's constitutionally deficient advice Mr. Horton's plea was not valid. Mr. Horton lacked critical information about the advantages and disadvantages of accepting the plea offer and the direct consequences of his no contest plea. *Padilla*, 559 US at 370, quoting *Libretti*, 516 US at 50-51. As a result, his plea was not knowing and voluntary. *Brady*, 397 US at 755. In short, counsel's ineffectiveness was a defect in the plea proceeding that entitles Mr. Horton to plea withdrawal. *Id.*; MCR 6.310(C).

This Court should take action to remedy the deprivation of Mr. Horton's rights to the effective assistance of counsel and the resulting invalid plea by vacating the plea and sentence and remanding this case to the trial court.

- g. Further, this Court should overrule the Court of Appeals' precedent that holds that a valid plea waives any violation of a defendant's speedy trial rights for the purpose of appellate review; these cases were incorrectly decided in light of this Court's decision in *New* and should be overruled.**

While this Court has held that the entry of a valid plea constitutes a waiver of the right to appeal most issues, even a valid plea does not waive legal errors which "would preclude the state from ever prosecuting the defendant for the crime regardless of his factual guilt." *New*, 427 Mich at 488.

It is hard to imagine a legal issue that would directly "implicate the very authority of the state to bring a defendant to trial" more so than the violation of a defendant's speedy trial rights. *Id.* at 490, quoting *White*, 411 Mich at 398. Where a defendant's speedy trial rights are violated, the "only possible remedy" under the law is dismissal of the charges. *Barker v Wingo*, 407 US 514, 522; 92 S Ct 2182; 33 L Ed 2d 101 (1972). In other words, where a defendant's speedy trial rights are violated, the state lacks authority to try the defendant, making speedy trial violations

the very sort of legal issues that can be raised on appeal even if the defendant has entered a valid plea. *New*, 427 Mich at 488.

Some published Court of Appeals decisions have reached contrary conclusions, but those decisions do not acknowledge or apply the *New* standard. *E.g.* *People v Scott*, 275 Mich App 521, 524; 739 NW2d 702, 704 (2007); *People v Depifanio*, 192 Mich App 257; 480 NW2d 616 (1991). Those decisions should be overruled.

- h. This Court's decision in *Lown* does not foreclose relief because it did not address a claim of ineffective assistance of counsel and its conclusions about the effect of a guilty plea on appellate review of 180-day rule violations were dicta.<sup>11</sup>**

The United States Supreme Court has recognized a critical distinction between legal claims of ineffective assistance of counsel and other types of legal claims in the context of plea appeals. In *United States v Broce*, the Court considered a collateral challenge to a guilty plea based upon a double jeopardy violation. *Broce*, 488 US at 573-574. In concluding that the defendant's knowing and voluntary plea foreclosed any collateral challenge, the Court noted that, "[a] failure by counsel to provide advise may form the basis of a claim of ineffective assistance of counsel" and could "serve as the predicate for setting aside a valid plea." *Id.* at 574.

In *People v Lown*, this Court clarified the correct interpretation of the 180-day rule established by MCL 780.131 and 780.133. *People v Lown*, 488 Mich 242, 246; 794 NW2d 9 (2011). At the time, the case was still in a pretrial posture. *Id.* at 252. Thus, the issue of whether a valid plea waives appellate review of a violation of the 180-day rule was not properly presented in *Lown*.

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<sup>11</sup> As noted in footnote 4, this case does not involve a violation of the 180-day rule, nor has Mr. Horton asserted that it does.

In the course of deciding that a violation of the 180-day rule deprived the trial court of personal jurisdiction and that defects in personal jurisdiction can be waived, the Court cited with approval a concurring opinion of Justice Boyle from *People v Smith*. *Id.* at 269. The *Lown* Court adopted Justice Boyle's analysis and cited with approval Justice Boyle's assertion that a violation of the 180-day rule is waived by an unconditional guilty plea. *Id.* at 269-270.

Although dicta in *Lown* suggests that a valid plea "waives" a 180-day rule violation, that dicta does not foreclose relief in this case for several reasons. First, there is no 180-day rule violation at issue in this case.<sup>12</sup> Even if one were to try to apply the reasoning of *Lown* in the context of a speedy trial violation, which is at issue in this case, *Lown* would still not foreclose relief here.

To the extent the *Lown* Court established a rule that violations of the 180-day rule (and by analogy speedy trial violations) are categorically waived by valid pleas, the Court disregarded its decision in *New*. See Issue (I)(G), *supra*.

Finally, the *Lown* Court was not tasked with addressing the issue of waiver and 180-day rule violation in the context of a plea. For that reason the Court did not consider the well-established principle that even where a valid plea waives a specific legal error for the purposes of appeal, trial counsel's failure to warn the defendant of that waiver may require the plea to be set aside. See *Broce*, 488 US at 574. As a result, the dicta in *Lown* did not address the appellate claims asserted in this case, which relate to counsel's failure to advise Mr. Horton of the direct consequences of his plea, including the waiver of the violation of his speedy trial rights.

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<sup>12</sup> See footnote 4.

**SUMMARY AND RELIEF SOUGHT**

Mr. Horton asks this Honorable Court to remand this case to the trial court to allow him to withdraw his plea or alternatively, for any other appropriate relief.

Respectfully submitted,

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